No. 98-687

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1998

STATE OF NEW JERSEY, Petitioner,

v.

LESLIE A. NELSON, Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF NEW JERSEY

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

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CAPITAL CASE

RESTATEMENT OF QUESTION PRESENTED

Whether, in a very unusual factual context, the State's suppression of evidence that would both advance the defendant's principal mitigating factor and impeach the State's star witness at defendant's penalty phase hearing, made it "reasonably probable that the jury would have given greater weight to the mitigating factor thus substantiated and would not have been convinced beyond a reasonable doubt that the aggravating circumstances outweighed the mitigating ones?"

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Respondent concurs in the statement of the Petition at p. 1.

JURISDICTION

Respondent concurs in the statement of the Petition at p. 2.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Respondent concurs in the statement of the Petition at p. 2, but would also include N.J.S.A. 2C:11-3c.(2)(b) (Murder):

> ...The defendant may offer, without regard to the rules governing the admission of evidence at criminal trials, reliable evidence relevant to any of the mitigating factors....

COUNTER-STATEMENT OF THE CASE

The New Jersey Supreme Court found the following to be the relevant facts:

> This is a capital murder case. There must be a new sentencing because the State withheld evidence favorable to the defense and material to the jury's determination whether defendant deserved the death penalty.
>
> Defendant Leslie Nelson has pled guilty to the killing of two police officers, Investigator John McLaughlin and Officer John Norcross, and to the second-degree aggravated assault of a third officer, Detective Richard Norcross, the brother of officer John Norcross. The killings and the assault occurred on April 20, 1995, during a shootout with the officers, who had come to defendant's home with a search warrant.
>
> The standoff was central to one of the mitigating factors in defendant's case. Investigator McLaughlin, who worked for the Camden County Prosecutor's Office, and Investigator Carmelo Garcia, of the Division of Youth and Family Services, went to defendant's home on the morning of April 20 to respond to a complaint that defendant had fondled her niece and threatened her niece with a shotgun. Haddon Heights Police Detectives Robert Griffith and Richard Norcross accompanied the two investigators.
>
> Defendant lived with her elderly parents in Haddon Heights. Defendant's van was parked outside of the home when the police arrived. When no one answered the door, the officers had their dispatcher call the home. Defendant answered, told the dispatcher she would not open her door, then hung up. The dispatcher called again and persuaded defendant to open the door by telling her the officers were investigating a problem with the van.
>
> After opening her door, defendant was reluctant to cooperate with the officers. At first she insisted on speaking only through the screen door. After a time, defendant

agreed to allow Investigator McLaughlin inside the home. When McLaughlin would not enter alone, defendant agreed to let Garcia inside as well. The other officers remained outside.

Once inside, McLaughlin and Garcia spoke to defendant for approximately ninety minutes in her living room. The conversation was generally calm. Defendant, however, became upset and raised her voice when the officers told her that she had been accused of committing a sexual crime. In the course of the discussion the officers learned that defendant had a knife and a shotgun and that she kept the shotgun locked in her bedroom closet. Defendant would not allow the officers to search her bedroom, although her mother allowed them to search the rest of the house. The search of the house, including the part of defendant's bedroom the officers could see through defendant's partly opened bedroom door, did not reveal any evidence of crime.

When the officers went downstairs, Investigator McLaughlin went outside. While McLaughlin was outside, Investigator Garcia noticed that defendant was very upset. She paced from window to window to see what the police were doing outside. Garcia described defendant's behavior at this stage as "paranoid." McLaughlin returned and asked defendant about her knife. Defendant at this point agreed to allow the officers to see her bedroom. In the room the officers saw a number of bullets and a four-inch lock-blade knife.

As the officers left the house, defendant asked about their plans for further investigation. Garcia told defendant that his part of the investigation was over, but McLaughlin said that he would have to discuss the matter with his superiors. Defendant told them that she would kill herself if she had to go to jail.

Norcross decided to obtain a warrant to search defendant's bedroom for weapons. Believing that "things might get hairy" when they served the warrant, the officers asked

for a "no-knock" provision in the warrant. A municipal court judge issued the "no-knock" warrant. Upon further consideration, the officers decided not to use the "no-knock" provision. They believed that the relationship that McLaughlin developed with defendant would make the search go smoothly.[1]

At about 2:00 p.m. that same day, six officers, including McLaughlin and Detective Richard Norcross, went to defendant's home to conduct the search. McLaughlin and Norcross went to the door, while the other officers remained outside. According to the testimony of Detective Norcross, defendant's mother answered the door and called upstairs to defendant that McLaughlin had returned. Defendant called back, "What the f--- does he want?" McLaughlin, in a "soothing tone," told defendant that he needed to ask some more questions. McLaughlin attempted to coax defendant down the stairs, speaking to her from the foot of the stairway as defendant stood at the top. Defendant asked if the officers had a warrant for her. McLaughlin explained that they did not have an arrest warrant, but they did have a warrant to search her bedroom. Just then Detective Norcross heard defendant begin to run, and he saw McLaughlin reach for his firearm and run up the stairs after defendant. When McLaughlin reached the top of the stairs and turned toward defendant's bedroom, defendant fired a rifle at him. McLaughlin fell, fatally wounded.

Detective Norcross continued up the stairs after Investigator McLaughlin fell. When he reached the top, defendant shot him, hitting him in the chest, hand, arm and leg. Norcross fell and slid back down the stairs. As he slid, defendant leaned out over the railing and shot Norcross once more in the leg. She then ran to the top of the steps and began to follow Norcross down.

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[1] McLaughlin's ultimate decision not to wear a bullet-proof vest because the search would "go smoothly" is seemingly at odds with his earlier assertion that he believed that "things might get hairy."

Defendant's mother called to her to stop, and she stepped between defendant and the detective. Norcross struggled to his feet and left the house through a side door.

Defendant went to a second-floor window and began firing at the officers outside. Ten or fifteen minutes after the gunfire began, defendant fatally shot Officer John Norcross, who was standing across the street from defendant's home.[2]

The Haddon Heights dispatcher called defendant's home soon after John Norcross was shot. Defendant told the dispatcher that she did not want police officers searching her room or taking her to jail. After a long negotiation conducted by telephone, defendant eventually surrendered.

A Camden County Grand Jury indicted defendant on two counts of knowing and purposeful murder by her own conduct, eight counts of first-degree attempted murder, third-degree unlawful possession of an assault firearm, and second-degree possession of a firearm for an unlawful purpose. Defendant pled guilty to the two capital murder counts and to second-degree aggravated assault of Detective Richard Norcross and was convicted of those charges on the basis of her plea.

At the sentencing trial, the State asserted the following aggravating factors in connection with the murder of Investigator McLaughlin: 1) the murders created a grave risk of death to Detective Norcross (the "grave risk" factor); 2) each murder was committed for the purpose of escaping detection, apprehension, trial, punishment, or confinement for the unlawful possession of a firearm (the "escape detection" factor); 3) each murder was committed while defendant was engaged in the murder of the other officer (the "other murder" factor); and 4) each murder occurred while the officers were

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[2] For clarity, it should be noted that some of the police officers, but not John Norcross, were firing at the house as defendant fired at them.

engaged in the performance of their official duties (the "public servant" factor). For the murder of John Norcross, the prosecution submitted only the escape detection, other murder, and public servant factors. It did not submit the grave risk factor.

Defendant countered with three mitigating factors for both murders: 1) she was "under the influence of extreme mental or emotional disturbance insufficient to constitute a defense to prosecution" (the "emotional disturbance" factor); 2) her "capacity to appreciate the wrongfulness of her conduct or to conform her conduct to the requirements of law was significantly impaired as the result of a mental disease or defect, but not to a degree sufficient to constitute a defense to prosecution" (the "impaired capacity" factor); and 3) "any other factor that the jury might find relevant to her prospects of rehabilitation or to the circumstances of the offenses, including [her] contention that the... officers [who came to her house] had inadequate training, preparation, and support from the Camden County Prosecutor's Office and from the Haddon Heights Police Department for dealing with a disturbed person, particularly one known to possess a firearm" (the "catch-all" factor).

Defendant's mitigating evidence centered on the mental illness she suffered as a result of years of painful doubt about her sexual identity. Defendant began life as a male named Glen Nelson. In 1986, defendant consulted a Colorado doctor about sexual reassignment. The doctor advised him to begin the sex-change process by taking estrogen and progesterone. Following a nineteen-day commitment to a mental hospital in 1988, defendant was diagnosed with severe depression and with schizoid and antisocial tendencies.

In July 1989, defendant underwent psychological testing to determine if he would be a good candidate for sex-change surgery. The test indicated that defendant may have suffered from a depressive disorder, a dysthymic disorder, a major affect disorder

or paranoia. He was not approved for the sex-change operation, but he began taking estrogen and progesterone. Defendant had breast augmentation surgery in May 1991, changed his name to Leslie, and began to live and dress as a woman. In September 1991, one of defendant's doctors described defendant as having "severe psychological problems." Still, defendant's doctors approved the sexual reassignment, in part because they feared defendant would commit suicide if he did not have the surgery. Defendant had the operation in May 1992.

After the sex-change operation, defendant's depression persisted. She developed a fixation or transference on a Browning handgun that she had bought, along with a semi-automatic assault rifle, in early 1989. As defendant's depression worsened, her obsession with guns deepened. Her bedroom, where she would spend hours polishing the guns, took on a surreal significance. A defense psychiatrist testified that her deteriorating mental condition caused an abnormal reaction to the threat of the police entering her bedroom.

With respect to the murder of Officer John Norcross, the jury unanimously found the "escape detection," "other murder," and "public servant" aggravating factors. It unanimously rejected the "emotional disturbance" and "impaired capacity" mitigating factors, and it voted nine to three to reject the "catch-all" factor. The jurors were unanimous in declaring, beyond a reasonable doubt, that the collection of aggravating factors, and each aggravating factor in isolation, outweighed the mitigating factors.

In connection with the murder of Investigator McLaughlin, the jury unanimously found three of the four proffered aggravating factors: the "escape detection" factor, the "other murder" factor, and the "public servant" factor. Only ten of the twelve jurors found the "grave risk" factor. The only mitigating factor the jury was unanimous in finding was the "emotional disturbance" factor. The jurors voted ten to two in

rejecting the "impaired capacity" factor and eight to four in rejecting the "catch-all" factor. The jurors could not unanimously agree that the aggravating factors outweighed the mitigating factor beyond a reasonable doubt.

The trial court sentenced defendant to death for the murder of Officer John Norcross and to life in prison with thirty years of parole ineligibility for the murder of Investigator McLaughlin. The court further sentenced defendant to a consecutive term of ten years in prison with a five-year parole bar for the second-degree aggravated assault of Detective Richard Norcross.

After the trial, it was revealed that Detective Richard Norcross, who had followed McLaughlin up the stairs and who was injured in the siege, had filed a civil suit against the county and municipal authorities. His tort claim alleged that the Borough of Haddon Heights and the Camden County Prosecutor's Office acted in a "palpably unreasonable" manner in "failing to provide proper training and instruction to ensure the safety of the Haddon Heights Police Officers" who served the search warrant on defendant. Norcross claimed that the officers' conduct had caused Leslie Nelson to react as she did and injure him. The complaint was served on the County Prosecutor's Office on May 8, 1997, which was the seventh day of the ten-day sentencing phase. Two years before serving the complaint, on July 14, 1995, Detective Norcross sent notice of his claims to the prosecutor's office, in accordance with the Tort Claims Act, N.J.S.A. 59:8-3 to - 11. The detective's tort claims notice alleged "improper hiring, screening, training and supervision." The prosecutor's office did not disclose this information to the defendant or defense counsel. Defendant called attention to the State's nondisclosure of the Norcross complaint in a post-sentencing motion for a new trial. The trial court denied that motion on July 22, 1997.

Defendant now appeals her death sentence under Rule 2:2-1(a). She has not challenged

the convictions, which were based on her guilty pleas.

State v. Nelson, 155 N.J. 487, 490-497, 715 A.2d 281, 283-286 (1998).

REASONS FOR DENYING THE WRIT

In concluding the opinion of the Court in this matter, Justice O'Hern wrote:

> Our dissenting members acknowledge that this constitutional safeguard [Brady[3]] was violated, but they find that the violation was not material to determining defendant's punishment. Try as we might, we cannot regard the Brady violation as immaterial to determining defendant's punishment. One of the central issues in the penalty trial, if not *the* central issue, was whether defendant's violent reaction could have been avoided had the police officers handled their investigation differently. The suppressed evidence directly supported defendant's mitigating theory. Had the source of that evidence not been the State's star witness in the case, and had the prosecutor's summation not attacked the defendant for daring to question the conduct of the police, we might be able to agree on the question of the materiality of the suppressed evidence.

Nelson, 155 N.J. at 513, 715 A.2d at 294 (italics in original, emphasis added).

Any fair reading of the opinion of the New Jersey Supreme Court in this matter demonstrates a direct application of highly particular facts to well-settled law, a circumstance which should not invoke the attention of this Court. The Petitioner, using deliberate obfuscation and a series of straw men, has presented this Court with a veritable creel of red herring, seeking to induce this Court to grant certiorari. At bottom, the Petitioner is dissatisfied with the factual conclusions of the New Jersey Supreme Court, and seeks to shroud the issue as a matter of law

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[3] Brady v. Maryland, 373 U.S. 83 (1963).

in an attempt to gain further review. This attempt should be rejected.

The Petitioner's first obfuscation is the statement that the "gist of this claim [in mitigation] was that the police officers were poorly trained, and hence they failed to take adequate precautions for their own safety." (Pet. at 5) In truth, this is a gross oversimplification of the mitigating factor, and the Petitioner, starting from this adumbrated premise goes on to later make wildly inaccurate assertions. In fact, the heart of the mitigating factor was that the law enforcement agencies involved had no proper protocols for dealing with an emotionally disturbed person who was armed with a gun. This failure led, in various forms, to much of the horrific result that day. As one example, the failure to have a protocol made it permissible for Investigator McLaughlin to attempt this high-risk warrant service without a bulletproof vest.[4] Another example of the harm in not having a protocol for high-risk warrant service was that there was no centralized command to relay information to and from the officers responding to the scene and nothing other than an ad hoc method for directing the activities of the officers on the scene.

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[4] Although the New Jersey Supreme Court's opinion speaks only of rifle fire as to Investigator McLaughlin, and, indeed at the end defendant was only firing the rifle, there was inferential evidence that McLaughlin was first shot with the Browning handgun, because a round from the Browning was recovered from Richard Norcross' bullet-proof vest, and, of course, McLaughlin was shot immediately before Norcross was shot. The evidence was that a bullet-proof vest would have stopped those rounds and, as Professor Donald McCauley testified, had McLaughlin been able to effectively return fire, the entire confrontation might well have ended there.

Thus, no one informed Officer John Norcross that Ms. Nelson was firing a rifle and not, as the officer closest to Norcross at the time of his death believed, a shotgun.

In short, the true "gist" of the mitigating factor was that a command failure, in the words of the New Jersey Supreme Court, "sparked" a confrontation with a deeply disturbed individual which could have been handled less violently, and that that same command failure resulted in a disorganized and ill-informed response which unnecessarily endangered all the officers arriving at the scene. However, the Petitioner's original misrepresentation of the mitigating factor leads inexorably to the Petitioner's later claim that the "court refused to explain why it is less deathworthy to murder a poorly-trained police officer than to murder a well-trained police officer." (Pet. at 14) Thus, the Petitioner's originally misstated "gist" is further distorted to make the State Supreme Court's decision seem less than rational. It is not, in the abstract, less deathworthy to murder a poorly-trained officer than a well-trained officer. However, this mitigating factor was not presented in the abstract, and the State Supreme Court did not find a Brady violation in the abstract but rather in the context of the events that day and in the context of the events at trial. These factual considerations, the circumstances surrounding the killings, and the highly particular facts at trial, are factual determinations by a state court and only through wholesale

distortions can the Petitioner hope to engage this Court's interest.

The Petitioner asserts that the defense claimed that McLaughlin "acted improperly by trying to save Nelson from her supposed suicide attempt." (Pet. at 5) Averting Leslie Nelson's suicide is Petitioner's theory of what McLaughlin was trying to do as he ran up the stairs that afternoon. However, the Petitioner takes no notice of Detective Norcross' testimony that as McLaughlin began to run up the stairs he swept his jacket back with one hand and reached across with the other as though he was drawing his gun. See Nelson, 155 N.J. at 493, 715 A.2d at 284. This is not to fault McLaughlin in any way: it is, however, to say that the evidence was not unequivocal that his purpose in running up the stairs was to prevent her suicide. Certainly Richard Norcross did not claim that as he followed McLaughlin up those stairs his primary concern was with preventing her suicide.

Whatever McLaughlin's motivation, what the defense expert, Professor McCauley, actually asserted was that it was rash and unnecessarily dangerous for McLaughlin to charge up the staircase of the Nelson home in pursuit of a plainly disturbed individual whom McLaughlin knew had a firearm. This sort of conflation of concepts and half-truths by the Petitioner is typical of the Petitioner's arguments.

In short order the Petitioner goes on to assert that the defense expert claimed that the officers "should have executed the warrant with a SWAT team." While Professor McCauley did

offer that as one alternative which might have been less bloody, he also offered a number of other alternatives as well, including, but not limited to, waiting for Ms. Nelson to leave the house for an appointment that afternoon, luring Ms. Nelson out of the house with a ruse, as the police had partly done earlier, or as a last resort, effecting the warrant in the manner suggested by the Petitioner. Having set up this straw man, the Petitioner concludes that it was not the defense position that "the police officers had acted too aggressively." (Pet. at 6) What the defense did assert was that there were other, less violent ways to execute the warrant and that if violence were ultimately necessary, steps should have been taken to ensure that no officer became the victim of that violence. In reality the defense position was that the police officers acted without careful deliberation because their supervisors had not created a policy requiring specific steps and formulation of contingencies in the execution of high-risk warrants. While it is true, and hardly a matter of great expertise, that McCauley admitted that a bulletproof vest would not have saved Officer Norcross' life (Pet. at 6), had McLaughlin been properly prepared, the confrontation might have ended on the staircase. Equally, had Officer Norcross been properly supervised and trained he might not have found himself exposed to the fire from the defendant's house. Indeed, the heart of the matter is this: if the warrant service had been properly handled, there might not have been gunfire at all. These, of course, are factual considerations

limited to this particular case, and the Petitioner seeks to distort them into a broad-reaching and irrational principle that might require this Court's attention.

By failing to account for all the facts, the Petitioner furthers its implication that the New Jersey Supreme Court acted whimsically in reaching the conclusion it did in this case. The Petitioner writes: "[a]pparently confusing the police officer in this case, who was a crime victim, with a police officer in the role of crime investigator, the court stated, 'Under either Kyles[5] or Giglio[6], we must impute awareness of the Norcross complaint to the trial prosecutor and hold that the evidence was suppressed for Brady purposes.'" (Pet. at 8) The Petitioner neglects to mention the two sentences immediately preceding the quoted portion of the opinion: "... the Camden County Prosecutor notified County Counsel in a letter dated August 7, 1995, that the Prosecutor would discuss the complaint with the assistant prosecutor handling defendant's trial. It appears that conversation never took place." Nelson, 155 N.J. at 499, 715 A.2d at 287. Thus, placed in context, the focus is on the conduct of the County Prosecutor and not, as the Petitioner would have it, on that of Richard Norcross. Respondent will ignore the Petitioner's seeming limitation on the ability of Richard Norcross to function in more than one capacity at a time. Instead, Respondent will direct this Court's attention to this

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[5] Kyles v. Whitley, 514 U.S. 419 (1995).

[6] Giglio v. United States, 405 U.S. 150 (1972).

plainly disingenuous reading of the opinion below and will suggest that it is symptomatic of the Petition.

Turning to the Petitioner's claims regarding the reasons for granting certiorari, the Petitioner first argues that "[i]n a capital sentencing hearing, ... mitigation evidence is not always self-evident, as this case illustrates." (Pet. at 11) (emphasis added) Since the language in the Tort Claims Notice and that portion of the complaint directed to the Prosecutor's Office virtually mirrors the language of the proposed mitigating factor, of which the trial prosecutor had knowledge months in advance of trial, it is difficult to fathom how this case illustrates mitigation evidence that is not "self-evident." Notably, while the trial prosecutor asserted that he did not know of the complaint, he never suggested that, had he known, he would not have immediately recognized its importance to the defense in the context of this trial. Again, the Petitioner uses a distorted view of the facts to endeavor to reach beyond the idiosyncracies of this case to a far-reaching concern as part and parcel of the attempt to have this Court see fit to grant certiorari. The Petitioner furthers this claim by asserting that: "the mitigating character of this evidence may not be apparent, even to the most conscientious prosecutor." (Pet. at 13) While that may be an interesting issue for some other case, here there can be no rational belief that if the trial prosecutor had known of the lawsuit, he would not have turned the complaint over to the defense team. Reasoning from this false premise, the Petitioner

goes on to claim that since the "'exculpatory' nature may not have been apparent ... it is imperative that there be a standard of gauging materiality for Brady claims that at least demands that the suppressed evidence rationally bear on the defendant's deathworthiness, if for no other reason than to give the prosecution notice and opportunity to comply with its disclosure obligation." (Pet. at 13) Again, while that may be an important issue in another case, involving different facts than this one, it is simply a theoretical concern here, divorced from the actual case.

Petitioner's proposed standard is, essentially, that it is for the prosecution to decide what a given defendant's theory of mitigation should be, and that materiality will then be gauged in the abstract. However this Court has never suggested that materiality is in any way an abstract consideration. Instead, materiality is directly tied to the facts and theories of the case and it is only in that factual context in which it can be judged. The New Jersey Supreme Court has passed on that factual consideration for this case and there is no reason to question that decision. Again, the trial prosecutor never suggested that he would not have recognized the mitigating character of the evidence, had he known of it.

The Petitioner continues this course of deliberate misreading of the opinion by arguing that the "state court's materiality analysis was so relaxed that it refused to look at the substance of the so-called Brady evidence...." (Pet. at 13)

The Court declined to evaluate the merits of the complaint because that was the jury's prerogative, and it was the allegations themselves that comprised the Brady evidence. Moreover, the Petitioner again declines to add the balance of the statement in the opinion: "It suffices to observe that the allegations would have profoundly altered the jury's perspective of the case." Nelson, 155 N.J. at 500, 715 A.2d at 287-288 (emphasis added). The Court did not "refuse" to look at the substance: the Court found it unnecessary to do so because the allegations themselves were sufficiently substantive to compel the result.

Continuing its disquisition on this new straw man, the Petitioner claims that the New Jersey Supreme Court "assumed" the lawsuit in fact reflected Richard Norcross' opinion and that the evidence "would have withstood adversarial testing on that point." (Pet. at 14) The fact that the lawsuit and the Tort Claim Notice had been filed would have been strong evidence for the defense, regardless of what Richard Norcross might have said about it from the witness stand. However, the more important problem is somewhat more immediate. It is always the nature of Brady evidence that it has not been tried in the crucible of "adversarial testing," for the simple reason that the State has suppressed the evidence. It is wholly disingenuous for the Petitioner to claim the evidence might not have fared well at defendant's trial when it was the Petitioner's own failure that

prevented the jury from considering the evidence in the first place.

Returning to an earlier enunciated theme, the Petitioner suggests that the Court gave "no consideration ... to the fact that the existence of this lawsuit says absolutely nothing about Nelson's deathworthiness." (Pet. at 14) When this claim is once again grounded in the facts of this case and the theories of defense of which the prosecution was full well aware, the existence of the lawsuit speaks volumes. As so often before, the Petitioner tries to divorce the opinion in this case from its strong factual underpinnings in order to make the instant decision appear to be one of general rather than highly fact-specific application.

The Petitioner then launches into a philippic which, taking full leave of the Court's opinion, vents the Petitioner's frustration at the factual predicate of the decision. (Pet. at 14) The Petitioner claims that the decision was devoid of explanation for many issues the Petitioner deems important. In fact the Petitioner is simply wrong in all of this. Respondent has already explained that the Court did not, as the Petitioner claims, "refuse[] to explain why it is less deathworthy to murder a poorly-trained police officer than ... a well-trained police officer." (Pet. at 14) Many of the same reasons applied to that misstatement apply with equal force to the next claim -- that "the court did not explain why the murder of John Norcross... was minimized by the allegation." (Pet. at 14) Only if a reader

accepts the tortured reading of the facts offered by the Petitioner does this question even present itself. In reality, the Court answers that question quite clearly. To paraphrase, the jury could have found that "defendant's violent reaction could have been avoided had the police officers handled their investigation differently." Nelson, 155 N.J. at 513, 715 A.2d at 294. Had there been no violent reaction, or at least no successful violent reaction, John Norcross might not be dead.

The Petitioner does not now, and has not in the past, accepted this as a valid theory of mitigation. It has never been clear whether the Petitioner finds it offensive to consider or merely unpersuasive. However, the distinction is essentially moot. The assistant prosecutor who tried the case found the evidence worthy of substantial vitriolic comment in his closing and indeed his eloquent assertion that the jury should "beware of people who...reflect in the cool of the evening on what better men do in the heat of the day," marked the pinnacle of his rhetorical zeal. See Nelson, 155 N.J. at 501, 513, 715 A.2d at 288, 294. Nor was the assistant prosecutor brief or careless in his cross-examination of Professor McCauley. All this is simply to say that the trial prosecutor found the matter important. The State Supreme Court unanimously found factually that the jury could have considered this to be significant mitigating evidence, and that finding alone should be the end of this line of inquiry

for this Court's purposes.[7] Nelson, 155 N.J. at 513, 518, 532, 715 A.2d at 294, 297, 304.

As to the New Jersey Supreme Court's alleged failure to discuss the admissibility of the evidence of the suit, (Pet. at 14) in the first place, the Petitioner oddly forgets that this was the penalty phase of a capital hearing. N.J.S.A. 2C:11-3 c.(2)(b), governing the admissibility of evidence at capital sentencing hearings, reads, in pertinent part: "The defendant may offer, without regard to the rules governing the admission of evidence at criminal trials, reliable evidence relevant to any of the mitigating factors." (emphasis added) It seems unlikely that the Petitioner is seriously asserting that Richard Norcross' view of the negligence with which the search warrant was executed would not rise to the level of "reliable" evidence. After all, by filing the suit, Norcross asserted that he was in fact prepared to prove that negligent training and supervision was a proximate cause of his injuries. Without doubt, with almost 10 years of experience in law enforcement, Richard Norcross acquired some knowledge of the standards and practices of police procedure. At the same time, the New Jersey Supreme Court may have been satisfied that by asking Norcross' opinion of the

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[7] The two dissenting justices found that the evidence was favorable to the defense and had been suppressed, but was not material. Nelson, 155 N.J. at 532, 715 A.2d at 304. The dissent never suggested that the improper supervision and training mitigating factor was irrelevant as to the Norcross murder. Moreover, the State did not object to this mitigating factor in the trial court, and the trial judge, in ruling on the new trial motion, merely found the suppressed evidence lacking in materiality, not relevance. (Pa 91-93)

professionalism of Investigator McLaughlin's conduct, the trial prosecutor opened the door to other opinions Richard Norcross may have formed on the subject of police professionalism. On the allied issue of the allegedly cumulative nature of this evidence, (Pet. at 14) as Justice Handler points out in his concurring opinion, "the prosecutor unfairly attacked the defense's evidence by challenging its source, the status of the experts as defense witnesses. Thus, the source of the evidence about the police negligence was central to the jury's evaluation of that evidence. The complaint would have provided a non-cumulative, and likely more trustworthy, source." Nelson, 155 N.J. at 522, 715 A.2d at 299.

Having fully cut loose the tether of the Court's actual opinion and the Court's insistence that the particular facts of this particular case compel this result, the Petitioner somehow imagines the court to have claimed that it was engaged by an "emotional reaction to the evidence." (Pet. at 14) The only support for this notion is the Petitioner's reference to the court's decision not to assess the merits of the complaint. (Pet. at 14) Of course that issue, and its willful distortion by the Petitioner, has already been discussed. The Petitioner then claims that "[s]eemingly, any evidence missing from a defense mitigation case because of prosecutorial nondisclosure automatically is material and requires reversal of the death sentence." (Pet. at 14) The New Jersey Supreme court wrote: "Had the source of that evidence not been the State's star

witness in the case, and had the prosecutor's summation not attacked the defendant for daring to question the conduct of the police, we might be able to agree [with the dissent] on the question of the materiality of the suppressed evidence." Nelson, 155 N.J. at 513, 715 A.2d at 294 (emphasis added). How one can derive the Petitioner's analysis with even scant attention to the Court's actual holding surpasses understanding.

The Petitioner then shifts its focus slightly and suggests that it was the holding of the New Jersey Supreme Court that "a Brady materiality analysis must be directed at the speculative emotional reaction of a single hypothetical juror." (Pet. at 15) First, the Court was not interested in the emotional reaction of anyone – it is only through the Petitioner's earlier miscasting of the opinion that the mitigating factor was not rational, and only from that flawed premise could the Petitioner draw the more deeply flawed conclusion that what the Petitioner does not perceive as rational, others must accept as emotional. Admittedly, in some sense every Brady materiality analysis is speculative. Because the State has suppressed the evidence, the reviewing court is forced to deduce or speculate upon what the effect would have been absent the State's improper conduct. However, as before, it does not lie in the Petitioner's mouth to rebuke the court for contending with a situation necessitated by the Petitioner's own failures. The Petitioner goes on to rewrite the holding of the court: "any nondisclosed evidence that could have caused one juror to find one mitigating factor is a material

Brady violation." (Pet. at 15) Obviously, one can only arrive at this conclusion by ignoring the court's ruling. The court wrote that it was "reasonably probable that the jury would have given greater weight to the mitigating factor(s) thus substantiated and would not have been convinced beyond a reasonable doubt that the aggravating circumstances outweighed the mitigating ones." Nelson, 155 N.J. at 501, 715 A.2d at 288. In sum, the court properly applied the standard of United States v. Bagley, 473 U.S. 667 (1985), and held that the suppression of evidence which, on these particular facts, was reasonably probable to be outcome-determinative, required a new trial. Try as it might, the Petitioner cannot redefine those words away.

In the end, by tortuously distorting the facts and the holding below, the Petitioner struggles to create, virtually from whole cloth, a matter meriting this Court's attention. In truth, there is nothing in this case but the application of some unusual facts to well-settled law. This court should decline to grant certiorari.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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DATED: November 23, 1998